IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 663 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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PRAVINBHAI VASANJI CHAUDHRI

Versus

STATE OF GUJARAT.

Appearance:

1. Criminal Appeal No. 663 of 1993
MS BANNA S DUTTA for appellant
MR KG SHETH, APP for Respondent

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 11/09/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

By filing this appeal under section 374(2) of the Code of Criminal Procedure, 1973, the appellant has challenged legality of judgment dated May 14, 1993 rendered by the learned Additional Sessions Judge, Surat at Vyara in Sessions Case No. 136/92, by which he is convicted under section 302 of the Indian Penal Code and punished with R.I. for life.

2. Deceased Nathariben, wife of Khalpabhai B. Chaudhari was resident of village Vaskui, Taluka : Bardoli, District : Surat. She was staying with her husband and was doing household work of one Bakulaben Natubhai. The incident in question took place on April 22, 1992. On the date of incident, she had gone to the well of Bakulaben for the purpose of fetching water and after fetching water was sitting on the otta of Bakulaben. At about 10.00 A.M., the appellant came with an axe in his hands and after uttering that Nathariben was a witch, gave a blow with an axe on the back of her right shoulder. At the time of incident, her grand son Savin Sumanbhai was also with her. Because of the assault mounted by the appellant, the deceased sustained a bleeding injury and was removed to her house. Her son Ranchhibhai removed her to Primary Health Centre, Vaskui, where she was treated by Dr, Kadwani, who was then medical officer on duty. The medical officer referred injured Nathariben to Sardar Smarak Hospital at Bardoli for expert investigation and treatment. Deceased Nathariben was, therefore, admitted in the hospital at Bardoli. After her admission in the hospital, P.S.O. of Bardoli Police Station sent an information to P.S.I. about Nathariben having been admitted in the hospital with an injury. The Police Sub Inspector was busy in connection with a cricket match and, therefore, went to the hospital on April 23, 1992 at about 2.00 A.M. in the morning and recorded complaint of deceased Nathariben against the appellant as stated by her. Initially, an offence punishable under section 324 I.P.C. was registered against the appellant. At Sardar Smarak Hospital,Bardoli, the deceased was treated by Dr. Daveshvar till April 28, 1992. The case of Dr. Daveshvar is that the relatives of Nathariben had requested to transfer her to Civil Hospital at Surat and, therefore, he had discharged injured Nathariben from Sardar Smarak Hospital, Bardoli. The evidence of Kanchhibhai Khalpabhai Chaudhari, who is son of deceased Nathariben would indicate that they had no money to remove the deceased to Civil Hospital at Surat for treatment and had, therefore, removed the deceased at her house situated at village Vaskui. As the injured

Nathariben was removed to her house, she could not get treatment and ultimately died on May 6, 1992 at about 6.00 P.M. On receipt of necessary information regarding death of the deceased, an offence under section 302 was registered against the appellant. Necessary investigation into the case was made by P.S.I. Mr. Chhatrasinh Ballubhai Parmar of Bardoli Police Station. On conclusion of the investigation, the appellant was chargesheeted of the offence punishable under section 302 I.P.C. in the Court of learned Judicial Magistrate, First Class, Bardoli. As the offence punishable under section 302 I.P.C. is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Surat for trial, where it was numbered as Sessions Case No. 136/92. The charge at Exh.2 was framed by the learned Additional Sessions Judge, Surat at Vyara against the appellant of the offence punishable under section 302 I.P.C. The charge was read over and explained to the appellant, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined, (1) Kanchhibhai Khalpabhai Chaudhari, P.W.1 Exh.7, (2) Ranchhibhai Khalpabhai Chaudhari, PW 2, Exh.8, (3) Bakulaben Natubhai, PW 3, Exh.9, (4) child witness Savin Sumanbhai, PW 4,Exh.10, (5) Ravindrabhai Bhaljibhai, PW 5 Exh.11, (6) Mohanbhai Chhikabhai,PW 6, Exh.12, (7) Dr.Satishkumar S.Kadwani, PW 7, Exh.14, (8) Dr.Rajiv Daveshvar, PW 8 Exh.17, (9) Rashiyabhai Bhimabhai Chaudhari, PW 9,Exh.19, (10) Chunilal Kikabhai, PW 10,Exh.20, (11) Bipinbhai Khalpabhai,PW 11, Exh.22, (12) Jagdishbhai Jamabhai Chaudhari,PW 12, Exh.24, (13) Lakhubhai Dullabhbhai, PW 13, Exh.25, (14) Bajabhai Nadiyabhai, PW 14,Exh.27, (15) Chhatrasinh Ballubhai Parmar, PW 15, Exh.28, (16) Ratanbhai Bhagabhai, PW 16 Exh.30,and (17) Trikamlal Ranchhodbhai Parmar, PW 17, Exh.35, to prove its case against the appellant. The prosecution also produced documentary evidence, such as, certificate of injury sustained by the deceased and issued by Dr.Kadwani, postmortem notes prepared by Dr.Kadwani, certificate of injury issued by Dr. Daveshvar, panchnama of place of incident, complaint filed by the deceased, inquest report etc. in support of its case against the appellant.

3. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant incriminating circumstances appearing against him in the evidence of prosecution witnesses and recorded his statement as required by section 313 of the Code of Criminal Procedure, 1973. In his further statement, the appellant claimed that the case of the prosecution against him was false, but did not examine any witness in

support of his defence.

4. On appreciation of evidence, the learned Judge held that the evidence of child witness Savin Sumanbhai and evidence of Ranchhibhai Khalpabhai Chaudhari established that the appellant had inflicted blow with an axe on back of right shoulder of the deceased. The learned Judge deduced that the complaint lodged by the deceased was her dying declaration and the complaint also established that the appellant was author of the injury caused to the deceased. The learned Judge thereafter took into consideration nature of the injury sustained by the deceased and held that the appellant had committed an offence punishable under section 302 I.P.C. In view of the above-referred to conclusions, the learned Judge by judgment dated May 14, 1993 has convicted the appellant under section 302 I.P.C. and punished him with R.I. for life, giving rise to the present appeal.

5. Ms. Banna Datta, learned counsel for the appellant pleaded that the evidence of child witness Savin Sumanbhai indicates that he had given the deposition as tutored by his maternal uncle and as his presence at the time of incident is doubtful, his evidence should not have been relied upon by the learned Judge for convicting the appellant. The learned counsel further submitted that the incident in question took place at about 10.00 A.M., whereas witness Rashiyabhai Bhimabhai Chaudhari, who claimed that he had witnessed the incident, had reached his place of service at about 10.00 A.M. and as his presence at the place of incident was not doubtful, his evidence could not have been relied upon by the learned Judge. What was claimed was that Nathariben was rendered speechless, which is evident from the evidence of her son Kanchhibhai Chaudhari and as the investigating officer Mr. Parmar had recorded the complaint of the deceased without getting verified from the doctor as to whether the deceased was in a fit state of mind to make statement, the complaint of the deceased should not have been used against the appellant. The learned counsel submitted that if the evidence is viewed as a whole, a reasonable doubt arises about the involvement of the appellant in the crime in question and, therefore, the appeal should be allowed. In the alternative, the learned counsel submitted that the appellant had given only one blow on the back of right shoulder which cannot be regarded as vital part of the body and as the deceased had died because of complications, such as infection etc., it cannot be said that the injury caused by the appellant was sufficient in the ordinary course of nature to cause her death and,

therefore, conviction of the appellant should be altered to under section 304 Part-I or Part-II of I.P.C. and sentence of 9 years & 4 months which is already undergone by him, should be imposed on him for the said offence.

6. Mr. K.G.Sheth, learned A.P.P. contended that evidence of child witness Savin Sumanbhai as well as that of eye witness Rashiyabhai Bhimabhai Chaudhari is cogent as well as reliable and, therefore, it cannot be said that any error is committed by the learned Judge on placing reliance on their evidence for the purpose of convicting the appellant under section 302 I.P.C. The learned counsel emphasised that the complaint of the deceased which should be treated as her dying declaration clearly implicates the appellant as the person who had caused injury to the deceased and, therefore, conviction of the appellant under section 302 I.P.C.. should be upheld by the Court. The learned counsel claimed that the infection and other complications were the direct result of the injury caused by the appellant to the deceased and in view of the medical evidence on record, the conviction of the appellant under section 302 I.P.C. should be maintained.

7. We have heard the learned counsel for the parties at length and reviewed as well as reappreciated the whole evidence on record. The evidence of witness Savin Sumanbhai PW 4, Exh.10 would indicate that he is a child witness. At the time of incident, according to him, he was with her grand mother i.e. deceased Nathariben. The witness has stated before the Court that the appellant had come to the place where his grand mother was sitting and had given a blow with an axe on her neck portion. The witness identified the appellant as the person who had caused injury with an axe to his grand mother. The witness stated that thereafter he had started crying and that Rashiyabhai was also sitting on another otta of house of Bakulaben, but he had not tried to intervene in the incident. In his cross-examination, the witness stated that his school was from 11.00 A.M. to 5.00 P.M. and that he had gone to his school at about 7.00 A.M. and had returned at about 11.00 A.M. The witness admitted that he was not able to read time and that his maternal uncle had taught him to say in the Court that blow with an axe was given to his grand mother when his grand mother was sitting on the otta. He denied the suggestion made by the defence that at the time of incident he was in school and was not present on otta. A reasonable reading of the evidence of the child witness makes it evident that at the time of incident he was studying in 1st Std. and it was difficult for him to

comprehend the things. However, his claim that he was with his grand mother stands amply corroborated by evidence of eye witness Rashiyabhai as well as the dying declaration of the deceased. Therefore, it will not be prudent to discard his evidence entirely, but it would be advisable to seek corroboration to his testimony. The evidence of eye witness Rashiyabhai Bhimabhai PW 9 Exh.19 shows that his house is quite near the otta of Bakulaben. The witness has asserted that when Nathariben was sitting on the otta of Bakulaben with Savin, the accused had come and given a blow with an axe on the neck of the deceased. The witness identified the appellant as person who had caused injury to the deceased. In his cross-examination, the witness stated that he had gone to attend his duty at 10.00 A.M. The witness stated that he was serving at village Madhi and that he would take 1 hour from village Vaskui to reach village Madhi if he were to walk. The witness further claimed in his cross-examination that from the distance of 200 ft., he had seen the appellant inflicting blow with an axe on the deceased. A bare reading of evidence of this witness makes more than evident that his assertion that he had seen the appellant inflicting blow on the deceased is not seriously challenged at all. No major contradictions with reference to his earlier statement are brought on record. The presence of this witness is quite natural, as his house is situated near the otta of Bakulaben where the incident had taken place. The contention that the incident had taken place at about 10.00 A.M. and the witness had reached village Madhi where he was serving at 10.00 A.M. which excludes his presence at the time of incident, has no substance. The Supreme Court in several reported decisions has ruled that the deposition of a witness with respect to time or the distance cannot be considered to be meticulously precise and due allowance must be made of time lapse between the observation and deposition. Further time is hardly of any importance to slow life in village and, therefore, witness Rashiyabhai cannot be disbelieved merely because there is some discrepancy about the time of incident given by him. On overall view of the matter, we find that he has no axe to grind against the appellant and would not involve the appellant falsely in such a serious case. It may be stated that Bakulaben on whose otta the incident had taken place, is examined by the prosecution at Exh.9. She has also stated in her deposition that child witness Savin Sumanbhai had stated to her that the appellant after addressing the deceased as a witch, had given blow with an axe. This statement of Bakulaben is not challenged in cross-examination at all. The evidence of child witness Savin Sumanbhai gets corroboration not only

from the evidence of eye witness Rashiyabhai Bhimabhai Chaudhari, but also from the evidence of Bakulaben Natubhai and medical evidence on record. The medical evidence on record establishes beyond shadow of doubt that the deceased had sustained injury on back of her right shoulder near neck. After reappreciating evidence of the child witness, witness Rashiyabhai and witness Bakulaben, we find that their evidence is cogent as well as consistent and as the same is corroborated by medical evidence, it should be acted upon.

8. Further the record indicates that Nathariben herself had lodged complaint against the appellant at Sardar Smarak Hospital, Bardoli, which was recorded by Mr. C.B. Parmar, P.S.I. of Bardoli Police Station. Mr. Parmar in his substantive evidence before the Court has stated that he had taken down the complaint as narrated by the deceased and that after recording of complaint was over, the same was read over to the deceased and the deceased had put her thumb impression thereon. The only suggestion made to this witness by defence was that he himself had concocted the complaint against the appellant and that deceased Nathariben had not dictated any complaint to him. Nothing has been brought on record to establish that P.S.I. Mr. C.B.Parmar was ill-disposed towards the appellant and was out to implicate the appellant falsely in such a serious case. The medical evidence on record does not show that the deceased was unconscious in the early morning of April 23, 1992 or that she was not able to make any statement. There is no reason to disbelieve the evidence of P.S.I. Mr. Parmar to the effect that he had recorded complaint of the deceased as narrated by her. The evidence of witness Ranchhibhai Khalpabhai PW.2 Exh.8 would also indicate that at Bardoli Hospital the deceased had told him that the appellant had given axe blow to her. On overall view of the matter, we are satisfied that the deceased was conscious and had lodged complaint with P.S.I. of Bardoli Police Station, which was recorded by the police officer as narrated by her. On the death of the complainant, her first information report will have to be treated as dying declaration. The statement made by the deceased in her dying declaration that the appellant was the author of the injury caused to her, is admissible in evidence under section 32 of the Indian Evidence Act. Though the law does not require that dying declaration should be corroborated by any independent evidence, we find that the statement made in the dying declaration stands amply corroborated by the evidence of child witness Savin Sumanbhai, eye witness Rashiyabhai Bhimabhai as well as the medical evidence and

it is safe to rely upon the same.

9. The above discussion of evidence on record establishes that it is proved beyond reasonable doubt by the prosecution that the appellant was the person who had caused injury to the deceased by means of an axe.

10. This brings us to the question as to which offence is committed by the appellant. The prosecution evidence establishes that the appellant had given one blow on the back of right shoulder of the deceased. In normal circumstances, this part of the body cannot be regarded as vital part of the body. After the incident, the deceased was removed to the Primary Health Centre of the village. Thereafter the deceased was removed to Sardar Smarak Hospital at Bardoli for expert investigation and further treatment. Initially, offence punishable under section 324 of the Indian Penal Code was registered against the appellant on the strength of complaint lodged by the deceased herself. The evidence of Dr. Daveshvar indicates that the deceased was treated at Sardar Smarak Hospital, Bardoli upto April 28, 1992 and thereafter on the request of the relatives of the deceased, she was discharged from the said hospital, as relatives wanted to take the deceased to Surat Civil Hospital for further treatment. We may state that the deceased and her sons were poor and therefore, this claim of the doctor that relatives wanted the deceased to be removed to Surat Civil Hospital does not appear to be correct at all. The evidence of witness Kanchhibhai as well as the evidence of witness Ranchhibhai clearly establishes that they had no money and, therefore, they could not remove the deceased to Surat Civil Hospital, but had removed the deceased to their house on discharge from Sardar Smarak Hospital,Bardoli. After removing the deceased to her house,probably she was not treated at all and, therefore, following complications arose : (1) Cerebral oedema due to infection as secondary from injury on right side of neck over back, (2) Meningitis from secondary infection of neck injury, (3) Cardiac failure due to erection of vaso vagal nerve because of neck injury, (4) Respiratory failure due to nerve's infection, (5) Pulmonary oedema because the nervous system was affected. According to Dr. Kadwani who had performed autopsy on the dead body, the cause of death was cardiac and respiratory failure. The doctor has stated before the Court that the cause of death of the deceased was infection in the wound and failure of respiratory as well as nervous system. The doctor did not state that the injury sustained by the deceased was sufficient in the ordinary course of nature to cause her death. It is

relevant to notice that the incident in question took place on April 22, 1992,whereas the deceased expired on May 6, 1992. From the record of the case, it is difficult to conclude that the injury sustained by the deceased was sufficient in the ordinary course of nature to cause her death. The medical evidence on record shows that the injury sustained by the deceased was likely to cause her death and, therefore, in our view, the offence committed by the appellant would be one punishable under section 304 Part-I of the Indian Penal Code and not under section 302 of the Indian Penal Code. Therefore, conviction of the appellant under section 302 of the Indian Penal Code is liable to be set aside and instead the appellant will have to be convicted of the offence under section 304 Part-I of the Indian Penal Code. The record of the case shows that without remission, the appellant has undergone sentence of more than 9 years and with remissions, he has undergone sentence of 11 years. Therefore, we are of the opinion that imposition of punishment of imprisonment already undergone by the appellant for the offence punishable under section 304 Part-I of I.P.C. would serve the ends of justice.

For the foregoing reasons, the appeal partly succeeds. The conviction of the appellant under section 302 I.P.C.. is set aside. Instead, the appellant is convicted of the offence punishable under section 304 Part-I of the Indian Penal Code and is sentenced to punishment of imprisonment already undergone by him. As the appellant has already undergone punishment imposed on him for the offence punishable under section 304 Part-I of the Indian Penal Code, the authorities are directed to set him at liberty forthwith unless his presence is needed with reference to any other case. The muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M.Panchal,J.)

(A.H.Mehta, J.)

(patel)